

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

VEOLIA TRANSPORTATION  
SERVICES, INC., d/b/a  
VEOLIA TRANSPORTATION

Employer

and

Case 05-RC-137335

AMALGAMATED TRANSIT UNION,  
LOCAL 689, associated with  
AMALGAMATED TRANSIT UNION,  
AFL-CIO

Petitioner

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board. Amalgamated Transit Union, Local 689, associated with Amalgamated Transit Union, AFL-CIO (the Petitioner or the Union) filed the petition seeing to represent the following unit of employees employed at the Washington, D.C. and Hyattsville, Maryland facilities of Veolia Transportation Services, Inc. (the Employer or Veolia): road supervisors and lead road supervisors.<sup>1</sup> The petition, as amended, asserts there are approximately fifteen employees in the petitioned-for unit. Pursuant to stipulations at the hearing, the Petitioner and the Employer stipulated, and I find, that the Petitioner is a labor

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<sup>1</sup> The Petitioner amended the petition at hearing to include only road supervisors and lead road supervisors; the petitioned-for unit described on the face of the petition was as follows:

All full-time and regular part-time Road Supervisors and Safety/ Trainer Supervisors employed by the Employer at its facilities currently located at 2219 Adams Pl. NE, Washington, D.C. and 3201 Hubbard Rd. Hyattsville, MD; but excluding all other employees, bus operators, utility workers, gatekeepers, office clericals, and managers as defined in the Act.

organization within the meaning of Section 2(5) of the Act, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board, and that there is no history of collective bargaining between the parties for the petitioned-for employees.

## **I. ISSUE AND POSITIONS OF THE PARTIES**

The sole issue presented at hearing is whether road supervisors and lead road supervisors are statutory supervisors as defined in 2(11) of the Act. The Employer argues that road supervisors and lead road supervisors are supervisors because they possess several indicia of supervisory authorities enumerated in Section 2(11). The Petitioner argues that road supervisors and lead road supervisors are not 2(11) supervisors.

For the reasons that follow in this Decision, and after careful consideration of the entire record evidence and the parties' post-hearing briefs, I find that road supervisors and lead road supervisors are supervisors as defined in Section 2(11) of the Act. Since road supervisors and lead road supervisors constitute the entire petitioned-for unit, I find that that unit is not appropriate. I am, therefore, dismissing the petition.

## **II. FACTS**

### ***A. The Employer's Business Operations and Organizational Hierarchy***

Veolia Transportation, Inc., a Maryland corporation with offices and places of business in Hyattsville, Maryland, and Washington, D.C., provides transportation services to private and governmental entities, including the Washington Metropolitan Area Transit Authority, also known as WMATA.<sup>2</sup>

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<sup>2</sup> The parties stipulated, and I find, that during the twelve-month period ending October 1, 2014, Veolia, in the course and conduct of its business operations described herein, has derived gross revenues in excess of \$250,000. During the period of time described herein, Veolia purchased and received at its Hyattsville, Maryland facility goods valued in excess of \$5,000 directly from points outside the State of Maryland.

Michael Staley is Veolia's Project Manager for a project contracted between Veolia and WMATA; the project is known as MetroAccess.<sup>3</sup> Reporting directly to Staley is Operational Director Melvin Barkley. Below Barkley are two Operational Managers, Larry Worthy and Shandell Hassan. Veolia employs two lead road supervisors and thirteen road supervisors between the two locations involved in the instant matter. The road supervisors and lead road supervisors report to Barkley, Worthy, and Hassan. Out of the two locations involved in this matter, Veolia employs about 600 operators responsible for picking up, transporting, and dropping off customers of WMATA's MetroAccess service. The Drivers, Chauffeurs, and Helpers Local Union No. 639, in affiliation with the International Brotherhood of Teamsters (Local 639) represents a bargaining unit including operators at Veolia's Washington, D.C. facility. The operators at Veolia's Hyattsville, Maryland facility are included in a bargaining unit represented by Local 1764, Amalgamated Transit Union (Local 1764). Both units are currently covered by collective-bargaining agreements.

***B. Road Supervisors' Duties<sup>4</sup>***

Road supervisors use official vehicles to travel in the geographic area to which they are assigned. The thirteen road supervisors are mainly responsible for observing operators while on their routes, and to investigate incidents or accidents that have been called in or that a road supervisor observes while in the field. In this context, the term "accidents" refers to situations such as when an operator's vehicle has been involved in a collision, while the term "incidents"

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<sup>3</sup> There are at least three other companies that contract with WMATA for the provision of MetroAccess services throughout the Washington metropolitan area: First Transit, Diamond Transportation, and MV Transportation.

<sup>4</sup> The Employer introduced into evidence a document purporting to contain a written job description for road supervisors. The record contains some discussion regarding the Petitioner's concerns that the Employer had created that document within the previous month. Although the evidence suggests the document was prepared recently, it is not clear that the Employer prepared the document for the purposes of litigating this matter, or that the document does not accurately reflect the responsibilities of road supervisors. Hearing testimony was adduced on several of the enumerated responsibilities listed on the document. Many of those itemized responsibilities contain conclusory language, such as "effectively recommends." In light of these circumstances, I have given little weight to the exhibit itself. Rather, I rely more heavily on the testimony about the road supervisors' duties and responsibilities.

describes situations in which a vehicle is out of active service for reasons other than a collision.

Examples of such “incidents” are when a customer becomes sick in a vehicle, or a road supervisor has a reasonable suspicion that an operator is under the influence of drugs or alcohol.

Road and lead road supervisors are responsible for the production of several types of documentation, including accident reports, incident reports, and road observation reports. Accident reports and road observation reports consist in large part of checklists on which the road or lead road supervisor records his or her observations of the circumstances. These checklists also serve as a guide for the road or lead road supervisor, by listing appropriate areas of inquiry or observation. When an operator is involved in an accident, the road or lead road supervisor assigned to the geographic area involved is sent to the scene to investigate the situation. The road or lead road supervisor is then tasked with the completion of an accident report kit, which she fills out based upon observations of the accident scene and information obtained from witnesses such as the operator and any passengers who may have been aboard the vehicle at the time of the accident. Based on these observations, and upon completion of the kit, a road supervisor is responsible for making a determination regarding whether the accident should be classified as preventable or not preventable.

Incident reports consist of a blank standard form on which the road or lead road supervisor records the results of his or her investigation into the situation.

Road observation reports consist of a checklist on which the road supervisor documents certain observations, such as the reason for the report (e.g., routine road check), actions taken by the operator during the observation, and the professionalism demonstrated by the operator. At the bottom of the form is a space reserved for the road supervisor’s notes.

### **I. Discipline and effective recommendation of discipline**

Road supervisors have the authority to orally coach and counsel an operator, write up an operator, or remove an operator from service and recommend that operator receive retraining in the relevant area, depending on the severity of the issue. Road supervisors Brian Jackson and Thomas Holtz testified at the hearing.<sup>5</sup> Each has been employed by Veolia as a road supervisor for about a year, and each previously was employed for another MetroAccess contractor, MV Transportation (MV), for over a year. Jackson and Holtz both also held the title of road supervisor while with MV. Holtz and Jackson both testified as to their authority to issue oral or written warnings to operators, or to remove an operator from his or her route for a variety of reasons. According to Jackson and Holtz, such reasons include violations of policies and procedures, set forth by WMATA, that govern certain operator conduct and establish safety protocols by which operators must abide while providing MetroAccess services. For instance, WMATA prescribes a door-to-door policy requiring operators to approach the exterior door of the building from which he or she is picking up a customer, collect the fare from the customer, and escort the customer to the door of the vehicle. Examples of safety protocols for operators include a requirement that operators place a safety cone when exiting their vehicles, and a requirement that wheelchairs must be secured when on the vehicles.

Upon completion, road and lead road supervisors submit each of the forms described above to Veolia's safety department or operations department. Road and lead road supervisors may note on these forms that they administered oral counseling or a written warning to the operator involved. When asked by the Hearing Officer if disciplinary counselings are part of the progressive discipline policy, Jackson replied,

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<sup>5</sup> Jackson is based out of the Hyattsville facility; the record is unclear as to which facility Holtz works out of.

Yeah, it's something we can exercise judgment on and it can be because, for instance, me being a supervisor and that's how I'm viewed from a driver, when I go out, say I see that driver again. . . then the next situation wouldn't be a[n oral]. It would be something I would write down, you know, and that would go into their file.<sup>6</sup>

Jackson testified further that he takes factors such as the experience level of the operator and the severity of the misconduct into account when deciding what level of discipline to apply to a situation.

Road supervisors are also authorized to remove an operator from service if the operator has been in an accident and the road supervisor deems the accident to have been preventable. Preventability is determined by road supervisors based on their assessment of the evidence gathered at the scene, including visual observations, interviews with operators and passengers, and any other evidence to which the road supervisor has access.<sup>7</sup> Road and lead road supervisors base their evaluation of the preventability of an accident on their knowledge of WMATA and Veolia policies and procedures, and on their experience in evaluating previous accidents.

Road supervisors also ensure that operators are fit for duty by observing the operator at work and, if the road supervisor believes it necessary, by asking questions of the operator. Road supervisors have the authority to remove an operator from service for the day should the road supervisor determine that the operator is not fit for duty at the time. Jackson stated that when making his observations in the field, he looks for signs that an operator is having difficulty with the physical requirements of the job, such as lifting bags or assisting a client with a wheelchair.

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<sup>6</sup> Jackson conceded that he is not aware of whether or not the warnings he issues are taken into account for the purposes of evaluating operators.

<sup>7</sup> Jackson testified that Veolia's safety managers can override his decision to remove an operator from service when that decision is based on accident preventability. For instance, if the safety manager has viewed the vehicle's on-board camera and comes to a different conclusion than the road supervisor, the operator may be returned to service. Jackson stated that when investigating an accident at the scene, he is not able to view the on-board camera footage.

Jackson testified that he has not in fact removed any operators from service during his roughly one year working for Veolia, but that he has the authority to do so.<sup>8</sup> Holtz testified that he has not recommended management discipline an operator during his time as a road supervisor at Veolia, but that he has the authority to do so. Jackson explained that when an operator is pulled out of service, that operator is effectively shut down and will not earn any more money that day. A road supervisor may remove an operator from service and recommend retraining without any intervening investigation from higher levels of management. In these situations, road and lead road supervisors are required to inform Veolia's safety and operations departments—as well as the central operations center that handles all of the contracted MetroAccess services—of the removal, so that another operator can be assigned to the removed operator's route. Jackson testified that, with regard to his decision making regarding the necessary level of response, “nobody's really going to question too much about what I see as a supervisor.” He also stated, “if I feel like it's something that I could do right then, that's fine, but if it's something that's egregious enough that they need to be taken out of service, I can take them out of service with no questions asked. . . .” Such an operator may also receive disciplinary documentation in his or her file, depending on what the infraction is. Jackson testified further that when a road supervisor removes an operator from service, “nine times out of ten, it's going to go into their files, their personnel files.”<sup>9</sup>

The collective-bargaining agreements covering the operators at Veolia contain sections governing progressive discipline. Each of those contains a first-level step that contemplates oral counseling or warning.<sup>10</sup> The collective-bargaining agreement between Veolia and Local

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<sup>8</sup> Neither witness testified as to exactly when or how they were granted this authority, but the evidence was uncontroverted regarding the witnesses' claims that they possess the authority.

<sup>9</sup> It is not clear from the record how exactly Jackson knows this, but this testimony, too, was uncontroverted.

<sup>10</sup> Neither collective-bargaining agreement identifies the potential source or sources of such discipline.

1764—covering operators at the Hyattsville facility—contains the following provision, at

Section 10.2:

Any violation of posted and/or Company rules, policies and/or procedures may result in disciplinary action. With the exception as listed under “Serious Infractions” below, and the attendance policy, any posted and/or written Company rules, policies, and/or Procedures may result in the following disciplinary action.

First Violation: Policy review/ documented verbal counseling.

Second Violation: First Written Warning Notice

Third Violation: Second Written Warning Notice

Fourth Violation: Suspension or May Result in Discharge From Company

The collective-bargaining agreement between Veolia and Local 639—covering operators at the Washington facility—also provides for a system of progressive discipline, at Article 15:

Disciplinary measures shall be taken in the following order:

- Oral reprimand
- Written reprimand
- Suspension, not to exceed five (5) days (notice to be given in writing).
- Discharge

Both agreements contain a grievance and arbitration procedure. Evidence was not adduced at hearing regarding road and lead supervisors’ respective roles in the grievance process.<sup>11</sup>

### **III. Rewarding employees**

Jackson and Holtz testified that they have carried out incentive programs implemented by the safety department in which they are able to select certain operators to receive rewards provided by the safety department. Jackson described a recent example—occurring the week prior to the hearing—involving an incentive program based on operators’ ability to recite a particular safety message that had been posted by the safety department. Jackson was given

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<sup>11</sup> Jackson referred to an arbitration at which he testified on behalf of his employer. However, that situation arose at his previous employer and did not involve an employee of Veolia. Similarly, Holtz testified about his experience testifying on his employer’s behalf at an unemployment hearing. The record is not clear, however, whether this was on behalf of Veolia or of Holtz’s previous employer.



three \$25 gift cards to give to operators within his observation area. During his observations in the field, he approached operators and asked if they could recite the safety message for the day. If an operator could recite the message correctly or to Jackson's satisfaction, he gave the operator one of the gift cards. Jackson testified that his discretion in this instance was based on predetermined rules. His instructions regarding this particular incentive program came from his lead road supervisor. The receipt of this particular reward was not connected to operators' performance of their duties. Holtz also referred in his testimony to the safety message program, but explained that even if an operator knew the safety message, she would need to follow all the proper procedures in order to receive a gift card. Holtz testified that recently he had a gift card to distribute and had a particular operator in mind that he assumed would be the recipient. However, when Holtz observed that operator on his route, the operator was not wearing a safety vest; Holtz did not give the operator an opportunity to recite the safety phrase.<sup>12</sup>

### ***C. Lead Road Supervisors' Duties***

No lead road supervisors testified at the hearing, nor did anyone higher in the Employer's hierarchy. The only record evidence regarding the responsibilities of lead road supervisors consists of witness testimony. Jackson explained that lead road supervisors "go out and do the same thing we do." Jackson testified that lead road supervisors also act as a liaison between the agencies involved in the MetroAccess project. Lead road supervisors also place calls to road supervisors alerting them to reported incidents and accidents, and direct the road supervisors to travel to the location of the situation to investigate. Lead road supervisors also inform road supervisors of safety incentive programs, such as the one described above, and provide road

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<sup>12</sup> Holtz stated that he also orally counseled the operator regarding his failure to wear a safety vest.

supervisors with the rewards to distribute. Jackson insisted that lead road supervisors are not bosses of road supervisors.

***D. Training on WMATA and Veolia Policies and Procedures***

Road and lead road supervisors undergo training intended to ensure that they are able to enforce the policies and procedures prescribed by both Veolia and WMATA. These include reasonable suspicion training, a day-long training designed to enable the trainee to identify factors indicating that an operator may be impaired by drugs or alcohol. Holtz testified that he has not seen written rules regarding policies and procedure, either from WMATA or from Veolia. Holtz testified that he is not aware of a rule book that might contain WMATA and/or Veolia policies and procedures. However, Holtz also testified that he attends two meetings each month at which policies and procedures are introduced and reviewed. One of these monthly meetings is held by WMATA and the other by Veolia. Road supervisors and lead road supervisors attend these meetings, along with Veolia management, at which they learn of or review policies and initiatives. Operators do not attend these monthly meetings.

***E. Evidence of Secondary Supervisory Indicia***

Road supervisors and lead road supervisors at the Hyattsville facility spend most of their days in the field, observing the operators and investigating incidents and accidents. When at the facility, they work out of a shared cubicle located within the facility's office area. Operators generally do not enter this area without first being called in by a road supervisor or other supervisor, such as a safety and training supervisor. While operators wear blue shirts as part of their required work attire, road supervisors and lead road supervisors wear white shirts that are labeled "supervisor."

Veolia's upper management team on the MetroAccess program consists of four individuals. The original petitioned-for unit included road supervisors, lead road supervisors, and safety/ training supervisors. The Petitioner identified the size of the unit as approximately twenty-five. The petitioned-for unit as amended at hearing includes thirteen road supervisors and two lead road supervisors.<sup>13</sup> As mentioned above, there are approximately 600 operators between the two facilities.

### **III. ANALYSIS**

As I explain below, I conclude that the Employer has met its burden of establishing that the road supervisors and lead road supervisors are statutory supervisors. I find that the record evidence establishes that road supervisors and lead road supervisors have the authority to discipline employees.

#### ***A. The Legal Standard for Supervisory Status under the Act***

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a supervisor as

"Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment."

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. *See NLRB v. Kentucky River Community*

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<sup>13</sup> Thus, it appears there are approximately ten safety and training supervisors between the Employer's two involved locations.

*Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)’s definition is read in the disjunctive and thus the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River Care, Inc.*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. *See, e.g., Children’s Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. *See, e.g., Kentucky River Community Care, Inc.*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). And because supervisors are excluded from the Act’s protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048. Supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

To meet this standard, the party bearing the burden must establish that an individual “actually possesses” a supervisory power; mere inferences or conclusory statements of such power are insufficient. *See, e.g., Golden Crest*, 348 NLRB 727, 731 (2006). Moreover, where

evidence is in conflict or otherwise inconclusive for a particular 2(11) indicium, the Board will decline to find supervisory status for that indicium. *See, e.g., Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Here, the Employer argues that road supervisors and lead road supervisors are statutory supervisors because each has the authority to exercise the following Section 2(11) powers: 1) the power to discipline and effectively recommend discipline of employees; 2) the power to reward employees; and 3) the power to assign and responsibly direct employees. I will address the sufficiency of the relevant evidence for each of these in turn.

On September 19, 2014, I issued a Decision and Direction of Election in *Diamond Transportation Services, Inc.*, 05-RC-134217, the facts in which share significant similarities with those in the instant case. In that Decision, I found that the petitioned-for unit—which was comprised of the road supervisors of another WMATA contractor—was appropriate, and that the employer involved in that case did not meet its burden of proving that the road supervisors were statutory supervisors under Section 2(11). While the facts here echo many of those in *Diamond Transportation*, I find that Veolia has met its burden, in part by adducing evidence that draws important distinctions between the authority possessed by road supervisors employed at each respective employer.

### **I. Disciplining Employees<sup>14</sup>**

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<sup>14</sup> Because I find that the road and lead road supervisors here possess the authority to discipline employees, I find it unnecessary to address the Employer's contention that road and lead road supervisors effectively recommend discipline.

To confer supervisory status based on authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. *See, e.g., The Republican Co.*, 361 NLRB No. 15 (2014) citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007) (“Contrary to the judge’s speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline . . .”). Warnings that simply bring the employer’s attention to substandard performance without recommendations for future discipline serve a limited *reporting* function, and do not establish that the disputed individual is exercising disciplinary authority. *Id.* at 5 (citing *Williamette Industries*, 336 NLRB 743, 744 (2001)). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. *Id.* (citing *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999) and *Ohio Masonic Home*, 295 NLRB 390, 394 (1989)).

In *The Republican Co.*, cited above, the Board affirmed a Regional Director’s finding that certain individuals were not Section 2(11) supervisors. 361 NLRB No. 15 at 1. In rejecting the Employer’s argument that the individuals at issue had the authority to discipline employees, the Board noted that “A warning may qualify as disciplinary within the meaning of Section 2(11) if it ‘automatically’ or ‘routinely’ leads to job-affecting discipline, by operation of a defined progressive disciplinary system.” *Id.* at 7 (citing *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007)). The Board went on to state that “the Employer. . . bears the burden of proving the existence of such a system, and the role that warnings play within the system.” *Id.* Here, the evidence clearly establishes that the operators employed by Veolia at each of the involved facilities are subject to a written progressive discipline system, as defined in the collective-bargaining agreements the Employer introduced into evidence.

It is clear from the record that road supervisors and lead road supervisors have the authority to orally counsel operators, orally warn operators, issue written warnings to operators, and remove operators from service, at least temporarily until further information can be obtained. Three of these four arguably disciplinary options are explicitly contemplated by the progressive discipline systems contained in the two collective-bargaining agreements covering the operators.<sup>15</sup> Some of these decisions require evaluation from higher level management, and some require collaboration with other supervisors such as safety managers. However, others begin and end with the road supervisors, who the record indicates have the power to issue disciplinary actions that are recorded and placed in employee personnel files. This gives rise to an inference that road and lead road supervisors are vested with the power to issue disciplinary actions that fall within the purview of the collective-bargaining agreements covering operators, and, pursuant to those agreements, are grievable. These circumstances are in marked contrast to those in *Diamond Transportation*, where the evidence failed to meet the standard discussed in *The Republican Co.* I find that the requirements of *The Republican Co.*, and the cases cited therein, are met here. Road and lead road supervisors thus have the authority to discipline employees at Veolia.

As stressed in the Board decisions cited above, such authority only implicates Section 2(11) if the possessor of the authority in question carries it out using his or her independent judgment. In *Oakwood Healthcare, Inc.*, 348 NLRB 689, 693 (2006), the Board held that in

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<sup>15</sup> The fourth, removal from service, is not contemplated in the collective-bargaining agreements. I note also that in my decision in *Diamond Transportation*, I found that simply because removal from service—and the attendant loss of pay—*effectively amounted* to discipline, it did not follow that such removal was discipline sufficient to confer supervisory status on the road supervisors there. Here, I take the same view of the road supervisors' authority to remove operators from service, but note that the authority is exercised in a distinct context, namely one in which the road supervisors exercise their disciplinary authority with independent judgment, as discussed below. I also note that to the extent Jackson is correct that "9 times out of 10" a removal from service goes into the operator's personnel file, that further distinguishes the instant case from *Diamond Transportation*.

evaluating whether a putative supervisor acts with independent judgment, the inquiry must “assess the *degree* of discretion exercised by the putative supervisor” where at one end of the spectrum there are detailed instructions for the individual to follow, and at the other end the individual is wholly free from constraint. *Id.* (emphasis in original). Here, there is a good deal of record evidence that many of the decisions made by road supervisors about whether or not to discipline operators are dictated by policies, procedures, rules, and guidelines that the Employer and WMATA have put in place. Admittedly, some of the decisions made by road and lead road supervisors are constrained considerably by rules and policies administered by WMATA and Veolia. However, this is not determinative in my evaluation of the issue at hand. If the evidence shows that road and lead road supervisors exercise Section 2(11) authority, do so more than sporadically, and do so with independent judgment, then the Employer has met its burden. The witnesses here testified as to how they exercise judgment when determining the level of discipline to apply to an operator. Jackson and Holtz both explained how a road supervisor may consider the experience level of an operator, and the severity of the infraction when determining whether to coach and counsel the operator, or to write the operator up on the forms submitted to the safety department. Jackson also testified repeatedly as to how he routinely approaches his responsibilities with such flexibility and case-by-case consideration. Accordingly, I find that road and lead road supervisors use independent judgment when exercising disciplinary authority in certain situations, and on more than a sporadic or infrequent basis.

In my Decision in *Diamond Transportation Services* (05-RC-134217), I discussed the similarities between the circumstances of that case and those in the Board’s recent decision in *Lucky Cab Co.*, 360 NLRB No. 43 (February 20, 2014). In both cases, employees classified as road supervisors prepared reports detailing their observations of drivers who were breaking work



rules or violating traffic laws. I found in *Diamond Transportation*—as the Board had found in *Lucky Cab*—that the evidence established that road supervisors did not impose or actually recommend any discipline in completing such reports and that those reports did not lay the foundation for future discipline. The instant case is distinguishable from both *Diamond Transportation* and *Lucky Cab*. Here, there is uncontroverted record evidence that operators are subject to a progressive discipline system. There is also uncontroverted record evidence in the instant case that the reports issued by road and lead road supervisors containing written warnings and memorializations of oral warnings are placed in operators' personnel files. Thus, while *Lucky Cab* was instructive in my determination in *Diamond Transportation*, I find the facts of the instant case sufficiently different and reach the opposite result here.

Furthermore, I find that the evidence in *Diamond Transportation* showed clearly that there were rules and policies by which the road supervisors in that case were constrained in their decision-making authority. Many of those rules and policies were admitted into the record through documentary exhibits. No such documentary evidence—again, aside from the checklists contained on the report forms—was introduced here. Furthermore, while Jackson and Holtz testified as to their knowledge of a range of policies and procedures handed down by WMATA and Veolia, Holtz clearly stated that he had not been given copies of these rules in his capacity as road supervisor. Much of Holtz's and Jackson's knowledge of the rules and policies seems to originate in the training they received, and the experience they accumulated, at their previous employer, MV.<sup>16</sup> Accordingly, in the absence of clear record evidence that Veolia road and lead road supervisors are so constrained in their decision making by rules prescribed by or espoused

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<sup>16</sup> Indeed, the testimony of both witnesses at times ventured from discussion of their employment at Veolia to their employment at MV, and back. Little record evidence actually identifies Veolia policies and procedures as such. While the policies dictated by WMATA are relevant to the instant case, those dictated by MV are not; I note here that I find that MV's rules and training cannot reasonably be imputed to Veolia in this context.

by Veolia as to preclude the exercise of independent judgment, I find that the road and lead road supervisors here exercise their disciplinary authority with independent judgment. I thus find that they possess one of the enumerated Section 2(11) indicia and that they are supervisors under the Act.

## **II. Rewarding employees**

The record contains evidence of only one specific example of road supervisors issuing rewards to other employees. Board precedent makes clear that sporadic, isolated, and infrequent instances of the exercise of supervisory authority is insufficient to confer Section 2(11) supervisory status. *See Chevron U.S.A.*, 309 NLRB 59, 61 (1992) and cases cited therein. Jackson did state that road supervisors have in the past been authorized to issue rewards to operators based on a given promotion or program, but the record does not make clear how numerous or frequent such authorization has been. Furthermore, the only example testified to involves an instance that occurred the week before the hearing. Jackson also testified that the determination of recipients of the gift cards was almost entirely dictated by a safety program initiated or conveyed by safety supervisors. The record thus contains clear evidence that road and lead road supervisors have exercised the authority to reward employees, but whether that evidence satisfies the Employer's burden is less clear. Since I have already decided that the road supervisors and lead supervisors possess one or more of the other Section 2(11) indicia, I find it unnecessary to pass on whether road supervisors and lead road supervisors have the authority to reward employees.

## **III. Assignment of work and responsible direction of employees**

In *Oakwood Healthcare*, above, the Board defined "assign" to mean:

The act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving

significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

348 NLRB 686, 689.

In *Oakwood*, the Board emphasized that an individual must assign *significant overall duties* rather than merely issue an ad hoc order to perform a discrete task, especially when the task is within a larger assignment. *Id.*

The *Oakwood* Board also interpreted the term “responsibly direct” to mean an individual’s decision to decide “what job shall be undertaken next or who shall do it.” 348 NLRB at 691. An individual who has this power is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. *Id.* at 691–92. For direction to be responsible, “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692. Therefore, an individual is not a supervisor solely because of his ability to direct an employee’s work; there must be an element of accountability as well. Additionally, to be carried out with independent judgment, the judgment cannot be dictated or controlled by detailed instructions. *Id.* at 693.

Here, road supervisors have little if anything to do with the initial allocation of route assignments and direction of operator tasks. Those responsibilities lie with the Operations Call Center and other dispatchers. In fact, even if a road supervisor removes an operator from service, that road supervisor is not responsible for replacing the operator, but simply reports to dispatch and/ or operations that such removal has occurred and a replacement is needed. Road supervisors are responsible for reassigning operators who for some reason have been out of service temporarily. The evidence does not demonstrate, however, that such direction or

assignment goes beyond routine. The record evidence is not particularly clear regarding whether road supervisors may in fact exercise independent judgment when deciding an operator should be returned to service. While many such decisions appear to be based simply on consultation with safety and fitness guidelines and procedures, no such guidelines and procedures were entered into evidence in this case. Here, the facts of the instant case are again distinguishable from those in *Diamond Transportation*, where the record contains documentary evidence of policies and procedures that effectively dictate the decisions of the road supervisors at Diamond Transportation. Again, no such documentation was produced here, and while there is a good deal of testimony referring to such written rules, there is also testimony suggesting that road supervisors make certain decisions not specifically dictated by rules written by Veolia or WMATA.

What the evidence is insufficient to establish, however, is that road supervisors engage in any assignment of work in the first place. While road supervisors can return an operator to service, the extent of this direction and assignment is routine; road and lead road supervisors simply return the operators to work on their already-scheduled shift, and dispatch handles the actual assignment of duties. There is also insufficient record evidence to demonstrate any accountability on the part of road and lead road supervisors regarding any direction of supervisors they may engage in.

Accordingly, I find that the Employer has failed to meet its burden to show that Veolia's road and lead and road supervisors have the authority to assign or to responsibly direct employees.

**IV. Secondary Indicia**

The Employer cites to several secondary indicia of supervisor status in support of its claim that road supervisors and lead road supervisors are Section 2(11) supervisors. In the absence of evidence that an individual possesses one of the primary indicia of Section 2(11) supervisory status, “secondary indicia are insufficient by themselves to establish supervisory status.” *Ken-Crest Services*, 335 NLRB 777, 779 (2001). However, given a finding of Section 2(11) status based upon one of the enumerated primary indicia, evidence of secondary indicia can serve to corroborate that finding. *See, e.g., Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007). As discussed above, I find that the road supervisors and lead road supervisors possess the authority to discipline Veolia’s operators. In light of that determination, I also note that the presence of several secondary indicia of supervisor status support my finding that road supervisors and lead road supervisors are 2(11) supervisors.

Between the two facilities involved in these proceedings, Veolia employs approximately 600 operators. The evidence strongly suggests that aside from the four individuals occupying the highest levels of operations management (i.e., Staley, Barkley, Worthy, and Hassan), the only individuals to whom operators can be said to report are the road and lead road supervisors and the safety and training supervisors. The former category is comprised of the fifteen individuals at issue here; there are approximately ten safety and training supervisors, who were amended out of the petition at hearing. If the road supervisors and lead road supervisors are not supervisors under the Act, and are found an appropriate unit for an election, the ratio of employees to supervisors would be nearly 44:1. Should the ratio include road supervisors and lead road

supervisors on the supervisory side, the ratio comes down to approximately 20:1.<sup>17</sup> While no evidence was introduced that would allow me to compare this ratio to that in other of the Employer's departments, or to determine if one of the above ratios is clearly unreasonable in the para-transportation industry, I find it significant that the inclusion of road supervisors and lead road supervisors in the petitioned-for unit would appear to leave operators with little if any oversight throughout the day.

Turning to a more visible secondary indicia, road and lead road supervisors wear uniforms distinct from those worn by operators, specifically with regard to the color of shirt they must wear. Road and lead road supervisors work out of office areas in each facility that are not normally accessed by operators. Road and lead road supervisors also undergo considerable training regarding the policies and procedures they are expected to enforce on behalf of both WMATA and Veolia; operators do not attend the training sessions that were described in the hearing testimony. As noted above, the hearing testimony established that road supervisors are trained in enforcement of—rather than mere compliance with—WMATA and Veolia policies and procedures. Veolia holds a monthly meeting at which policies and procedures are introduced or reviewed; road and lead road supervisors are required to attend these meetings, along with Veolia management. Operators do not attend these meetings. Similarly, road and lead road supervisors attend monthly meetings organized by WMATA, at which WMATA reviews policy and procedure. Operators do not attend these WMATA meetings.

In the aggregate, I find that the secondary indicia considered above lend considerable support to my determination that road and lead road supervisors are supervisors under Section 2(11).

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<sup>17</sup> I make no finding here as to the Section 2(11) status of the safety and training supervisors, but note that if none of the individuals included in the original petitioned-for unit are supervisors, the ratio of employees to supervisors would be about 156:1.

In sum, I find that the Employer has successfully carried its burden to show that road supervisors and lead road supervisors are able to discipline employees. Thus, I find road supervisors and lead road supervisors are supervisors according to Section 2(11) of the Act. As the petition seeks a unit comprised entirely of individuals I find to be supervisors, I dismiss the petition.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and affirmed;
2. As stipulated by the parties, the Employer is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case;
3. As stipulated by the parties, Petitioner is a labor organization within the meaning of Section 2(5) of the Act;
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act;
5. Road supervisors and lead road supervisors are supervisors within the meaning of 2(11) of the Act;

## **VI. ORDER**

It is hereby ordered that the petition filed in this case is dismissed.

### **RIGHT TO REQUEST REVIEW**

***Right to Request Review:*** Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

***Procedures for Filing a Request for Review:*** Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on November 10, 2014 **at 5 p.m. (ET)**, unless filed electronically.

**Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>18</sup> A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

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<sup>18</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.



Re: Veolia Transportation Services, Inc.  
d/b/a Veolia Transportation  
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October 27, 2014

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at [www.nlrb.gov](http://www.nlrb.gov). Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

*/s/ Charles L. Posner*

Dated: October 27, 2014

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Charles L. Posner, Regional Director  
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